Office-Supreme Court, U.S.
FILED
AUG 16 1981
ALEXANDER L. STEVAS, CLERK

No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

AMERADA HESS CORPORATION,

Plaintiff-Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

(Attorneys' names appear on inside cover)

Of Counsel:

ALFRED E. KEANE
DANIEL A. PILOSENO
Texaco Inc.
Tax Department
2000 Westchester Avenue
White Plains, N.Y. 10650
(914) 252-4392

BARRY WERTZ
Counsel
Exxon Company U.S.A.
a Division of Exxon
Corporation
P.O. Box 2180
Houston, Texas 77001
(713) 656-3583

ARTHUR C. VANGELI
SYDNEY M. AVENT
1 Presidential Blvd.
Bala Cynwyd, PA 19004
(215) 581-2121

DONOVAN LEISURE NEWTON & IRVINE
Thomas R. Trowbridge III
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

James P. Shaughnessy
1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4700

BOND, SCHOENECK & KING
One Lincoln Center
Syracuse, New York 13202

Counsel For Plaintiffs-Appellees
Mobil Oil Corporation,
Atlantic Richfield Company,
United Refining Company,
Chevron U.S.A. Inc.,
Amoco Oil Company,
Texaco Inc. and
Exxon Corporation

EDWARD F. GERBER
631 University Building
Syracuse, New York 13202
(315) 472-4484

Counsel For Plaintiff-Appellee
Gulf Oil Corporation

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
Stanley D. Robinson
Randolph S. Sherman
425 Park Avenue
New York, New York 10022
(212) 407-8000

HANCOCK, ESTABROOK, RYAN,
SHOVE & HUST
William L. Allen, Jr.
One Mony Plaza
Syracuse, New York 13202
(315) 471-3151

Counsel For Plaintiff-Appellee
Amerada Hess Corporation

CLEARY, GOTTLIEB, STEEN
& HAMILTON
James C. Blair
George Weisz
Sara D. Schotland
Thomas J. Moloney
One State Street Plaza
New York, New York 10004
(212) 344-0600

and

BOUCK, HOLLOWAY and KIERNAN
Warner M. Bouck
107 Columbia Street
Albany, New York 12210
(518) 465-2201

Counsel For Plaintiff-Appellee
New England Petroleum
Corporation

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
A. The Federal Regulatory Program	4
B. The New York Statute	8
ARGUMENT	9
I. This Court Only Has Jurisdiction To Review TECA's Preemption Decision By Writ of Certiorari, Not By Appeal	9
II. Whether the State Proceeds By Appeal Or By Petition For Writ Of Certiorari, Further Review By This Court Is Unwarranted	12
A. The Jurisdictional Issue	13
1. This Court Has Already Declined To Review The Question Of The District Court's Jurisdiction; Since That Question Was Not Decided By TECA, It Is Not Now Properly Before The Court	13
2. The § 1341 Issue Was Correctly Decided Under Circumstances Which are Unlikely to Recur	15
3. The Tax Injunction Act Is Also Inapplicable Because the Federal Courts Have Exclusive Jurisdiction Over the Preemption Claim	17
B. The Preemption Issue	19
1. The Lower Courts Correctly Applied Preemption Principles In Holding The Anti-Passthrough Provision Invalid	19
2. The State Presents No Argument Which Is Worthy of Review	22
a. The EPAA's Express Preemption Provision Does Not Limit The Application Of The Supremacy Clause To State Price Regulations	22
b. The State May Not Undermine the Decision To Deregulate Petroleum Product Prices By Attacking Congress' Logic	24
c. The State Improperly Relies on Labels, Disregarding the Federal Law's Structure, Purpose and Effect	26
d. The Preemptive Effect Of The EPAA And Price Regulations Is Not Diminished By Two Letters Written By DOE Employees	28
CONCLUSION	31

TABLE OF AUTHORITIES

Cases	PAGE
American Airlines, Inc. v. *Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969)	13n
American Federation of Labor v. *Watson*, 327 U.S. 582 (1946)	18
Armour & Co. v. *Ball*, 468 F.2d 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973)	13n
Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U.S. 767 (1947)	19
Brady v. *Terminal R.R. Ass'n.*, 302 U.S. 678 (1937)	14n
Bray v. *United States*, 423 U.S. 73 (1975)	12n
Brookhaven Cable TV, Inc. v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979)	13n, 25
Buckner v. *Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd mem.*, 434 U.S. 898 (1977)	13n
Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)	19n
C.D.R. Enterprises v. *Board of Educ.*, 412 F. Supp. 1164 (E. D. N.Y. 1976), *aff'd mem.*, 429 U.S. 1031 (1977)	13n
Chicago & Northwestern Transportation Co. v. *Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232 (March 9, 1981)	19&n, 21n, 27
Commonwealth Edison Co. v. *Montana*, 49 U.S.L.W. 4957 (July 2, 1981)	23n
Conference of Fed. Sav. & Loan Ass'ns v. *Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980)	13n
Consumers Union of the United States, Inc. v. *Sawhill*, 525 F.2d 1068 (TECA 1975)	5
Czajkowski v. *Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978)	17n
Department of Employment v. *United States*, 385 U.S. 355 (1966)	17n

PAGE

Donelon v. *New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) 13n

Durousseau v. *United States*, 10 U.S. (6 Cranch) 307 (1810) 9n, 10

Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 9, 10, 12

First Agricultural Bank v. *Tax Comm'n*, 392 U.S. 339 (1968) 17n

Free v. *Bland*, 369 U.S. 663 (1962) 19n

Fry v. *United States*, 421 U.S. 542 (1975) 12n

Great A&P Tea Co. v. *F.T.C.*, 440 U.S. 69 (1979) ... 26

Hewlett-Packard Co. v. *Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) 13n

Holding v. *Blankenship*, 387 U.S. 94 (1967) 15n

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) ..... 19&n, 23, 24, 28

Key v. *Doyle*, 434 U.S. 59 (1977) 12

Lewis v. *Campbell*, 425 F.2d 77 (5th Cir. 1970), *aff'd mem.*, 401 U.S. 985 (1971) 13n

Liberty Mutual Insurance Co. v. *Wetzel*, 424 U.S. 737 (1976) 18n

Lopez v. *Vowell*, 471 F.2d 690 (5th Cir.), *cert. denied*, 411 U.S. 939 (1973) 13n

Mandel v. *Hutchinson*, 336 F. Supp., 772 (C.D. Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974) 17n

Maryland v. *Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981) 27

Maynard v. *Hecht*, 151 U.S. 324 (1894) 9n

Merrill v. *Petty*, 83 U.S. (16 Wall.) 338 (1873) 9n

Miranda v. *Nelson*, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.*, 413 U.S. 902 (1973) 13n

Mishkin v. *New York*, 383 U.S. 502 (1966) 15n

Mobil Oil Corp. v. *Department of Energy*, 610 F.2d 796 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980) 5n

PAGE

Mobil Oil Corp. v. *Dubno*, 492 F. Supp. 1004 (D. Conn. 1980) *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3954 (June 23, 1981) 21, 25

Mobil Oil Corp. v. *Dubno*, 639 F.2d 919 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3954 (June 23, 1981) 16

Moe v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976) 17n

MTM, Inc. v. *Baxley*, 420 U.S. 799 (1975) 12

Murdock v. *Memphis*, 87 U.S. (20 Wall.) 590 (1875) 9n

Northern States Power Co. v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) 13n, 19n

Perez v. *Campbell*, 402 U.S. 637 (1971) 21n, 28

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).... 19, 21, 24, 25, 26, 29

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 27

Sanitary Refrigerator Co. v. *Winters*, 280 U.S. 30 (1929) 14n

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 28, 29

Steadman v. *Securities and Exchange Commission*, 49 U.S.L.W. 4174 (February 25, 1981) 25

Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 18

United States v. *More*, 7 U.S. (3 Cranch) 159 (1805) 9n

Wells v. *Malloy*, 510 F.2d 74 (2d Cir. 1975) 17n

Woolfolk v. *Brown*, 456 F.2d 652 (4th Cir.), *cert. denied*, 409 U.S. 885 (1972) 13n

Zap v. *United States*, 330 U.S. 800 (1947) 14n

Administrative Decisions

Amerada Hess Corp., DOE Case No. BEE-1310 (Sept. 24, 1980), *finalized*, 7 DOE ¶ 81,068 (1980) 6n, 30n

Mobil Petroleum Co., 5 DOE ¶ 81,188 (1980) ..6n, 20n, 30n

Texaco Inc., DOE Case No. BEE-1246 (Aug. 22, 1980), *finalized*, 6 DOE ¶ 81,382 (1980) 30n

PAGE

Union Oil Co., 2 DOE ¶ 80,174 (1978) 30n
Union Oil Co., 5 DOE ¶ 81,342 (1980) 30n

Constitution

U.S. Const. art. III, § 2, cl. 2 9

Statutes

28 U.S.C. § 41 11
28 U.S.C. § 43 ..... 11&n
28 U.S.C. § 1254(2) 10, 11, 15
28 U.S.C § 1291 ..... 11n
28 U.S.C. § 1292 ..... 11n
28 U.S.C. § 1294 ..... 11n
28 U.S.C. § 1341 ..... *passim*
28 U.S.C. § 2103 ..... 1, 12, 15n, 31
1980 N.Y. Laws, chs. 271 and 272 8
ch. 271, § 4 8
ch. 271, § 12 9
ch. 272, § 1 8

Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note
§ 211 11
§ 211(a) ..... 18&n
§ 211(b)(1) 11
§ 211(b)(2) 18n
§ 211(g) 9, 10, 11, 12
Emergency Petroleum Allocation Act, as amended, 15 U.S.C. §§ 751—760h 2
§ 751(a)(3) 4
§ 753(a) 4
§ 753(b)(1) 4, 5n
§ 754(a) 10n
§ 754(b) 6
§ 755(b) 6, 22, 23
§ 760a(b) 7

PAGE

Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (1975) 25
New York Tax Law § 182 8
§ 182(1) 8, 18n
§ 182(12)(a) 8
Tax Injunction Act, 28 U.S.C. § 1341 ..... *passim*

Regulations

10 C.F.R. § 205.80 28
10 C.F.R. §§ 205.80-.86 ..... 30n
10 C.F.R. Part 212 2-3
10 C.F.R. § 212.83(c)(2)(iii)(E)(7) 5

Court Rules

Sup. Ct. R. 16 1
Sup. Ct. R. 28.1 ..... 1n
Sup. Ct. R. 51.2 ..... 14, 15n

Federal Register Materials

41 Fed. Reg. 17513 (April 26, 1976) 7n
42 Fed. Reg. 5023 (Jan. 27, 1977) 5

Miscellaneous

Decontrol of Oil, Statement by the President on Signing Exec. Order 12287, 17 WEEKLY COMP. OF PRES. DOC. 53 (January 28, 1981) 7

Legislative Materials

H. R. Conf. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688 5
H. R. Rep. No. 340, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1762 6
S. Conf. Rep. No. 516, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1956 ..... 6, 24-25

No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

AMERADA HESS CORPORATION,

Plaintiff-Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, plaintiffs-appellees ("appellees") respectfully move for an order dismissing the appeal of defendants-appellants, the members of the New York State Tax Commission, New York's Attorney General and its Energy Commissioner (collectively "the State"), because no appeal to this Court lies from decisions of the Temporary Emergency Court of Appeals ("TECA").[1] If that motion is granted and the State's Jurisdictional Statement is considered as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, appellees submit that the petition should be denied. Should appellees' motion to dismiss be denied, appellees move alternatively for an order affirming the decision below because the questions presented are so insubstantial as to require no further argument.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear an appeal from a decision of TECA when Congress has only provided for review of that court's decisions by writ of certiorari?

2. Whether the effect of the Tax Injunction Act (28 U.S.C. § 1341) on the district court's jurisdiction may be raised as an issue in an appeal from a decision of TECA when TECA never decided the issue and this Court declined to review the same issue when it was presented in appellants' petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit?

3. If review of the Second Circuit's decision is now proper, whether the Tax Injunction Act divests the federal courts of jurisdiction to adjudicate the constitutionality of a state price regulation when (a) appellees did not seek to

1. Filed herewith under separate cover is a bound appendix listing, pursuant to Sup. Ct. R. 28.1, all parent companies, subsidiaries, except those which are wholly owned, and affiliates of each corporate appellee.

"enjoin, suspend, or restrain the assessment, levy or collection" of any tax; (b) the only arguable interference with the assessment, levy or collection of a state tax is the result of the State's calculated decision to link the survival of its tax to the validity of its price regulation; and (c) the federal district courts had exclusive jurisdiction over appellees' preemption claim?

4. Whether a state statute regulating the price of petroleum products which the federal government has determined should be free from price regulation is preempted by the federal statute and regulations embodying that determination?

5. Whether a state statute prohibiting recovery of an increased tax cost in New York conflicts with federal price regulations expressly authorizing such recovery?

STATEMENT OF THE CASE

In June 1980 the State of New York enacted a new franchise tax intended to finance the operating deficits of New York's mass transit system. The legal incidence of this tax was placed upon oil companies operating in New York. The State, however, went one step further. Rather than allow the economic burden of that tax to be determined by the interaction of free market forces and the federal regulations then in effect, the State entered the field of petroleum product price regulation. That price regulation, known as the anti-passthrough provision, prohibits firms from including the tax in the sales prices of their products sold in New York, thus insulating New York's citizens from the cost of operating its mass transit system.

In July 1980 appellees commenced these actions in the United States District Court for the Northern District of New York challenging the anti-passthrough provision and alleging, *inter alia*, that it conflicts with the federal Emergency Petroleum Allocation Act ("EPAA"), as amended, 15 U.S.C. §§ 751-760h, and the Mandatory Petroleum Price

Regulations, 10 C.F.R. Part 212, and is thus preempted pursuant to the Supremacy Clause of the United States Constitution.[2] On September 4, 1980, the district court (McCurn, J.) issued an order denying the State's motion to dismiss under the Tax Injunction Act and granting summary judgment in favor of appellees on the ground that the anti-passthrough provision was preempted by the EPAA and pertinent price regulations. A. 67a.[3] The reasoning underlying these conclusions was set forth in a Memorandum Opinion and Order issued on September 19, 1980, when judgment in appellees' favor was entered. A. 28a.

The State first appealed to the United States Court of Appeals for the Second Circuit. There, in addition to contesting the merits of the district court's preemption decision, the State contended that the district court lacked jurisdiction on the theory that appellees' challenge to the anti-passthrough provision was an action to stay or enjoin the collection of the New York tax within the meaning of the Tax Injunction Act. On January 28, 1981, a unanimous panel of the Second Circuit recognized that the anti-passthrough provision was an exercise of "a police power affecting the price structure of petroleum products" and that appellees had not sought a federal ruling invalidating the tax itself. A. 26a. Accordingly, the court held that the challenge to the State's restraint on appellees' pricing freedom was within the district court's jurisdiction. A. 16a.

Further recognizing that the preemption issue adjudicated by the district court presented an EPAA question which was within TECA's exclusive appellate jurisdiction, the Second Circuit dismissed that portion of the State's appeal. *Id.* The State thereupon pursued an appeal of the

2. Appellees also challenged the anti-passthrough provision under the Commerce and Due Process Clauses of the United States Constitution. In light of the district court's disposition, these claims were never reached below.

3. "A" references are to the Appendix to appellants' Jurisdictional Statement ("Juris. St.").

district court's preemption ruling to TECA. No issue was raised in TECA as to the jurisdiction of that court, or the district court, to adjudicate the controversy. Instead, while its appeal on the merits was pending before TECA, the State petitioned for certiorari, requesting this Court to review the Second Circuit's jurisdictional decision under the Tax Injunction Act. TECA's opinion affirming the district court's preemption decision was issued on June 15, 1981. A. 1a. On June 23, 1981, this Court denied the State's petition for a writ of certiorari to the Second Circuit. 49 U.S.L.W. 3954 (No. 80-1864).

A. The Federal Regulatory Program

The EPAA was enacted in 1973 in response to the national energy crisis created by the Arab oil embargo of 1973 and ensuing petroleum product shortages. 15 U.S.C. § 751(a)(3). Recognizing that the "threat to the public health, safety and welfare [could] be averted or minimized most efficiently and effectively through prompt action by the Executive Branch of [the federal] government," *id.*, Congress required the President to promulgate a regulation providing for the allocation and pricing of crude oil, residual fuel oil and refined petroleum products. 15 U.S.C. § 753(a). Rather than give the President free reign in developing that program, Congress required him to promulgate regulations which further nine specified national policy objectives "to the maximum extent practicable." 15 U.S.C. § 753(b)(1).

Those objectives are at times inconsistent and represent competing interests.[4] Thus, their furtherance "'to the maximum extent practicable,' [requires] . . . a 'balancing'

4. They include "protection of public health . . . safety and welfare, . . . and the national defense; maintenance of all public services . . . including transportation facilities and services which serve the public at large . . .; preservation of an economically sound and competitive petroleum industry . . .; equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States . . .;

approach to achieve maximization of the legislative goals." *Consumers Union of United States, Inc. v. Sawhill,* 525 F.2d 1068, 1073 (TECA 1975). The purpose of that balancing approach is more than consumer protection.[5] It is instead "[m]ost importantly [to] strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688, 2703.

The President's delegates balanced those objectives by developing price regulations which limited the price which could be charged each class of purchaser to the sum of May 15, 1973 prices plus certain specified categories of increased costs. State and local franchise tax cost increases initially were not among the specified costs which refiners were authorized to recover. In 1977, however, the federal agency[6] amended the regulations to authorize recovery of increases in those costs, finding that this would further the accomplishment of the nine EPAA policy objectives to the maximum extent practicable. 10 C.F.R. § 212.83(c)(2)-(iii)(E)(7), 42 Fed. Reg. 5023 (Jan. 27, 1977). That amendment authorized appellees to recover all their increased franchise tax costs from all of their customers, including those who purchase petroleum products in New York.[7]

---

economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." 15 U.S.C. 753(b)(1).

5. In striking the requisite balance, "[n]o single factor is inherently more important than any of the other factors. Instead . . . all nine factors are to be balanced objectively." *Mobil Oil Corp. v. Department of Energy,* 610 F.2d 796, 801 (TECA 1979), *cert. denied,* 446 U.S. 937 (1980).

6. At that time, the agency was the Federal Energy Administration, a predecessor of the present Department of Energy ("DOE").

7. When presented with a new four percent Guamanian gross receipts tax, the DOE suspended the operation of certain price regulations which would have required the tax to be passed through largely outside Guam. It concluded that requiring non-Guamanian consumers to pay a tax

The statute authorizes the President to delegate his EPAA authority to both state and federal officials. 15 U.S.C. § 754(b). Each chief executive, however, has recognized the need for a uniform national balance of the EPAA objectives and has delegated virtually all EPAA authority to federal officials and none to any state or local government. Congress itself recognized the paramount need for a coordinated national energy policy by providing that any state regulation in conflict with the EPAA regulations is preempted. 15 U.S.C. § 755(b).

As initially enacted, the EPAA required the President to subject all products within the scope of the EPAA to the mandatory allocation and price regulations. In 1975, Congress recognized that its 1973 belief that the OPEC cartel would be short-lived was inaccurate and found that the nation had entered a "new era" requiring "policy decisions at a national level." H.R. Rep. No. 340, 94th Cong., 1st Sess. 1, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS, 1762, 1763. It therefore extended the EPAA, amending the act to permit the President to exempt particular products from the price and allocation controls. The purpose of that exemption authority was to effect a gradual decontrol of petroleum product prices in favor of the market mechanism as the method of counteracting OPEC's impact. S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1956, 2045. To ensure that any exemption was consistent with the EPAA objectives, Congress only permitted the President to make such an exemption after he determined

---

imposed on Guamanian consumption of petroleum products "would frustrate one of the objectives that Congress sought to further in the [EPAA], that of providing for the 'equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States.'" *Mobil Petroleum Co.*, 5 DOE ¶ 81,188 at p. 82,989 (1980). The intent of the taxing state is irrelevant to that policy. In response to a similar Connecticut tax, which the legislature did not want to be passed through, the DOE suspended the regulations so that any passthrough would take place in that state. *Amerada Hess Corp.*, DOE Case No. BEE-1310 (Sept. 24, 1980), *finalized*, 7 DOE ¶ 81,068 (1980).

> that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section [4(b)(1)] *and* that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

15 U.S.C. § 760a(b) (emphasis added).

When New York enacted the anti-passthrough provision, only gasoline, propane and certain natural gas liquids remained subject to the price and allocation regulations. The other petroleum products had been exempted by the President's delegates upon findings that those actions would achieve, to the maximum extent practicable, the EPAA objectives.[8]

In one of the first acts of the present administration, President Reagan took a further step toward adopting the market mechanism to counteract OPEC's impact by exercising his EPAA authority to decontrol the products which remained subject to the detailed price regulations. In doing so he declared that "[p]rice controls have . . . made us more energy-dependent on the OPEC nations" and concluded that "ending price controls is a positive first step towards a balanced energy program — a program free of arbitrary counterproductive constraints, one designed to promote prudent conservation and vigorous domestic production." Decontrol of Oil, Statement by The President on Signing Exec. Order 12287, 17 WEEKLY COMP. OF PRES. DOC. 53 (January 28, 1981). Completing the implementation of its decontrol decision, Congress legislated September 30, 1981 as the expiration date of the President's standby authority to reimpose controls.

---

8. For example, in one of the first exemption decisions, the Federal Energy Administration made its affirmative intentions unambiguous by concluding that "the proposed exemption [was] necessary to the attainment of . . . EPAA objectives." 41 Fed. Reg. 17513 (April 26, 1976).

B. The New York Statute

On June 18, 1980, New York enacted two bills establishing its plan to raise funds for New York City's mass transit system. 1980 N.Y. Laws, chs. 271 & 272, A. 81a-102a. That legislation creates a new section 182 of the New York Tax Law which imposes an additional franchise tax on oil companies equal to two percent of their gross receipts allocable to New York. N.Y. Tax Law § 182(1), A. 84a. Subsection 12 of the new section 182 attempts to insulate New York residents from the normal economic consequences of the tax and the cost of the mass transit services they use by regulating the prices of firms subject to the tax. The anti-passthrough provision thus provides:

> The tax imposed . . . shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12)(a), 1980 N.Y. Laws, ch. 271, § 4, A. 88a. This provision is supplemented by a requirement that firms certify under oath that they have not included the tax in the prices of their products sold in New York. *Id.* The act subjects a firm to substantial penalties if the Tax Commissioner determines that it has not complied with the anti-passthrough provision.

The anti-passthrough provision is not a revenue raising device. Rather, the express legislative objective is to control oil company prices so as "to do nothing that will contribute to further *increases in the price of petroleum products* to [New York] consumers" and "to prevent such gross receipts tax from *fueling inflation* by prohibiting the pass through of such tax to the consumers of this state." 1980 N.Y. Laws, ch. 272, § 1 (emphasis added), A. 95a-97a. What is more, New York deliberately determined that if it could not control the oil companies' prices, it would forego the gross receipts tax entirely. Thus, the legislature included a

"self-destruct" clause, which provides that if the anti-passthrough prohibition is held to be invalid, the tax itself "shall cease to be in force and effect" ten days thereafter. 1980 N.Y. Laws, ch. 271, § 12, A. 99a-101a. The only effect of the anti-passthrough provision on revenue is through the operation of this non-severability provision — in other words, the calculated decision of the legislature to link the continued existence of the tax to the validity of the anti-passthrough provision.

ARGUMENT

I

THIS COURT ONLY HAS JURISDICTION TO REVIEW TECA'S PREEMPTION DECISION BY WRIT OF CERTIORARI, NOT BY APPEAL

The Constitution provides that, in all cases within the judicial power of the United States other than those within the Supreme Court's original jurisdiction, the Court "shall have appellate jurisdiction, both as to law and fact, with such exceptions and such regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2. It has long been established that Congress exercises its right to make exceptions to the Court's jurisdiction by affirmatively describing that jurisdiction. By making such an affirmative grant, Congress, by negative implication, forecloses any jurisdiction not described. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).[9]

Congress provided that the Court may review TECA's decisions through § 211(g) of the Economic Stabilization

9. *Accord*, *Maynard v. Hecht*, 151 U.S. 324, 325 (1894); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 620 (1875); *Merrill v. Petty*, 83 U.S. (16 Wall.) 338, 346 (1873); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810); *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805).

Act of 1970 ("ESA"), 12 U.S.C. § 1904 note,[10] which provides:

> Within thirty days after entry of *any judgment* by [TECA], a petition for a writ of certiorari may be filed in the Supreme Court of the United States and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in [28 U.S.C. § 1254].

Id. (emphasis added). By providing solely for review by certiorari within 30 days of "entry of any judgment by [TECA]," Congress eliminated the possibility of review of TECA decisions by appeal. *Ex parte McCardle, supra; Durousseau v. United States, supra.*

The State does not attempt to support its assertion of appeal jurisdiction by reference to ESA § 211(g), the only section that refers specifically to TECA's decisions. Rather, the State relies on 28 U.S.C. § 1254(2), even though that section only provides that

> [c]ases in the *courts of appeals* may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

28 U.S.C. § 1254(2) (emphasis added). Since that section only applies to decisions of "the courts of appeals," whether this Court has appeal jurisdiction depends on whether TECA is such a court. Although TECA's status is thus crucial to its position, the State makes no effort to show that TECA is a "court of appeals" within the meaning of that section, other than a bare assertion that "TECA . . . is of course denominated a 'Court of Appeals.'" Juris. St. at 3.

10. Incorporated by reference in the EPAA, 15 U.S.C. § 754(a).

Contrary to the State's construction of § 1254(2), "courts of appeals," when used in Title 28 of the United States Code, describes only the circuit courts of appeals created by 28 U.S.C. § 43 for each of the twelve judicial circuits established by 28 U.S.C. § 41. It does not refer to other specialized federal courts, like TECA, which are given limited appellate jurisdiction over cases arising out of particular subject areas.[11] In fact, ESA § 211(b)(1), rather than constituting TECA a "court of appeals," grants it, with one exception, only "the powers of a circuit court of appeals with respect to the jurisdiction conferred upon it." The State's construction would render that grant of authority superfluous. Indeed, since Congress directed this Court to review TECA's decisions "in *the same manner as* a judgment of a United States Court of Appeals," ESA § 211(g) (emphasis added), *only after a petition for a writ of certiorari has been filed*, it obviously did not consider TECA a court of appeals for purposes of § 1254(2).

Although the State was well aware of appellees' position, Juris. St. at 1, it offers no affirmative basis for concluding that 28 U.S.C. § 1254(2) applies to TECA decisions. Its only attempt is the naked assertion that "[i]t is logical to conclude that Congress intended that, except to the extent it provided otherwise, the provisions for Supreme Court review would apply to TECA decisions in the same manner as to decisions of the other courts of appeals." *Id.* at 2. That conclusion is, of course, directly contrary to the strict

11. Congress granted TECA "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the EPAA and ESA] or under regulations or orders issued thereunder." By contrast, the circuit courts of appeals created by 28 U.S.C. § 43 are, *inter alia*, given "jurisdiction of appeals from [all final decisions] of the district courts of the United States . . . except where direct review may be had in the Supreme Court," and other non-final decisions of those courts, 28 U.S.C. § 1292, with venue for those appeals specified by 28 U.S.C. § 1294. If, as the State contends, TECA were a "court of appeals" within the meaning of Title 28, it too would have jurisdiction pursuant to 28 U.S.C. §§ 1291-1292, something Congress did not intend when establishing that court.

construction this Court has always given to congressional grants of jurisdiction. *Ex parte McCardle, supra.* It is also "at odds with the historic congressional policy of minimizing the mandatory docket of [the] Court in the interest of sound judicial administration." *MTM, Inc. v. Baxley,* 420 U.S. 799, 804 (1975); *accord, Key v. Doyle,* 434 U.S. 59, 65 (1977). Finally, it substantially impairs achievement of one of Congress' goals in constituting TECA a national appellate court—prompt resolution of cases involving national economic and energy policy.[12] Thus, the State's position is not advanced by its contention that "the policy behind § 1254(2) is equally applicable whether the decision against the state law is made by TECA . . . or by one of the circuit courts of appeals," Juris. St. at 3, when Congress has clearly not seen fit to authorize review by appeal.[13]

The State seeks to use its contrary view of Congress' "logic" to defeat the congressional intent manifested in ESA § 211(g). That position should be rejected and the State's appeal dismissed.

II

WHETHER THE STATE PROCEEDS BY APPEAL OR BY PETITION FOR WRIT OF CERTIORARI, FURTHER REVIEW BY THIS COURT IS UNWARRANTED

Anticipating appellees' motion to dismiss, the State requests the Court to treat the Jurisdictional Statement as a petition for writ of certiorari under 28 U.S.C. § 2103 if its appeal is dismissed. The State argues that "the policy that a state statute should not be finally nullified without Supreme Court review still has force," Juris. St. at 3, and should result in the Court issuing a writ to review TECA's

12. *See Bray v. United States,* 423 U.S. 73, 74 (1975).

13. It is noteworthy that in *Fry v. United States,* 421 U.S. 542, 548 (1975), where this Court affirmed a decision of TECA enjoining Ohio officials from paying, pursuant to an Ohio statute, salaries which were in excess of those authorized by the federal Pay Board on the ground that "under the Supremacy Clause the State must yield to the federal mandate," TECA's decision was reviewed by certiorari, not appeal.

decision. There is, however, no such policy, since this Court has often denied certiorari in cases where state or local regulations have been found preempted.[14] Even if there were such a policy, it would be irrelevant since, irrespective of the appropriate mode of review, there is nothing in this case which warrants further consideration by this Court.[15] Appellees thus submit that if the Court determines that it has jurisdiction to review TECA's decision by appeal, it should grant the motion to affirm. If the Court determines that it only has jurisdiction to review TECA's decision by writ of certiorari, the State's petition for that writ should be denied.

A. The Jurisdictional Issue

1. *This Court Has Already Declined To Review The Question Of The District Court's Jurisdiction; Since That Question Was Not Decided By TECA, It Is Not Now Properly Before The Court*

After the Second Circuit's decision, the State petitioned this Court to review the question whether the district court

14. *See, e.g., Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); *Lopez v. Vowell*, 471 F.2d 690 (5th Cir.), *cert. denied*, 411 U.S. 939 (1973); *Armour and Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973); *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir.), *cert. denied*, 409 U.S. 885 (1972); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

15. Even when review is by appeal the Court frequently affirms, without argument or opinion, decisions holding state statutes preempted. *See, e.g., Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd mem.*, 434 U.S. 898 (1977); *C.D.R. Enterprises v. Board of Educ.*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd mem.*, 429 U.S. 1031 (1977); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.*, 413 U.S. 902 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *Lewis v. Campbell*, 425 F.2d 77 (5th Cir. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

was divested of jurisdiction by 28 U.S.C. § 1341. At the same time, the State prosecuted its appeal to TECA, challenging the merits of the district court's preemption ruling but not its jurisdiction to make that ruling. TECA was never asked to adjudicate the jurisdictional issue. Shortly after TECA's decision was rendered, this Court declined to review the Second Circuit's jurisdictional ruling. Since this is an appeal from a judgment of TECA, or alternatively a petition for a writ of certiorari to review that judgment, it follows that there is nothing for this Court to review insofar as the Tax Injunction Act is concerned. The court that decided that jurisdictional question was the Second Circuit, not TECA, and the State has already availed itself of the opportunity to seek review of that question by this Court. In reality, therefore, the State is again seeking review of the Second Circuit's decision.[16]

By pressing its jurisdictional attack despite the prior denial of certiorari, the State is attempting to circumvent Rule 51.2 of this Court. Review of the denial of a petition for a writ of certiorari is properly sought by a petition for rehearing pursuant to Rule 51.2. It may not be sought through a second petition or a request in an unrelated jurisdictional statement as the State has done here. The reason for the State's failure to follow proper procedure is apparent. Under Rule 51.2, a rehearing petition "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." The State, however, has advanced no arguments other than those made in its first petition.[17]

16. The State makes no bones about the fact that it is challenging the "Second Circuit's decision" with respect to 28 U.S.C. § 1341. Juris. St. at 16.

17. Even rehearing petitions which comply with the rule are generally granted only in extreme circumstances. *See, e.g., Zap v. United States*, 330 U.S. 800 (1947) (rehearing justified by new and controlling Supreme Court decision); *Brady v. Terminal R. R. Ass'n.*, 302 U.S. 678 (1937) (rehearing granted when reason for denial of certiorari was obvious jurisdictional defect that was cured in the interim); *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n.1 (1929) (grant of rehearing

Without strict adherence to the policy of the rule, the Court would be inundated with petitions rearguing the worthiness of particular cases for certiorari.

Even if the Jurisdictional Statement did comply with the Court's rules, the issue of the district court's jurisdiction is not one which may be reviewed by appeal. It does not involve a state statute which has been declared invalid as repugnant to the federal constitution or statutes issued thereunder as required by 28 U.S.C. § 1254(2). The decision of the Second Circuit is only that the Tax Injunction Act does not bar appellees' challenge to the anti-pass-through provision. The Court commonly separates certiorari issues from appeal issues within a single case.[18] In this case that has already been done by virtue of the State's petition for certiorari from the Second Circuit's § 1341 ruling. That petition having been denied, there should be no further review.

2. *The § 1341 Issue Was Correctly Decided Under Circumstances Which are Unlikely to Recur*

The Second Circuit's jurisdictional decision involves neither a significant nor a recurring issue. Whether the Tax Injunction Act applies when a state ties the validity of a price regulation to a tax provision has absolutely no significance beyond the narrow confines of this case. The State has cited no other instance in which a state has legislated linkage of this kind and appellees are aware of none. Nor does the State offer a reason for supposing that

because of new and conflicting decision by another circuit court). A petition, such as the State's here, which does not comply and does not certify compliance "shall be rejected by the Clerk." Sup. Ct. R. 51.2.

18. *See, e.g., Mishkin v. New York*, 383 U.S. 502, 512-15 (1966) (Court noted jurisdiction as to appealable issues but declined to decide issues for which certiorari was appropriate); *Holding v. Blankenship*, 387 U.S. 94 (1967) (Court noted jurisdiction as to single question presented by decision below and, citing 28 U.S.C. § 2103, considered the second issue in the jurisdictional statement as if presented in a petition for a writ of certiorari, which it denied).

any other state will adopt such a measure in the future. There is therefore no reasonable prospect that the § 1341 issue presented by this case is likely to recur. Indeed, Connecticut — the only other state which has attempted to prohibit oil companies from increasing petroleum product prices to recoup the cost of a gross receipts tax — expressly provided that the tax would continue in effect even if the attempt at price control were declared invalid. *See Mobil Oil Corp.* v. *Dubno,* 639 F.2d 919, 922 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3954 (June 23, 1981).

In any event, the district court and the Second Circuit were eminently correct in rejecting the State's argument that 28 U.S.C. § 1341 divested the district court of jurisdiction. By its very terms, that section strips a federal district court of jurisdiction *only* when it is asked to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" and there is "a plain, speedy and efficient remedy" in the state courts. Here, as the Second Circuit pointedly observed, quoting a statement made below by appellant Tully, appellees sought no such relief because they "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." In other words, the anti-passthrough provision "is all that the court enjoined." A. 27a. As the Second Circuit further pointed out, it is no answer to say that by virtue of the self-destruct aspect of the legislation, the tax will fall if the anti-passthrough provision is invalidated, since this was the "calculated decision" of the legislature itself. *Id.*

In the final analysis, the Second Circuit was plainly correct when it rejected the State's argument that the anti-passthrough provision was a "rule of tax incidence" which could not be enjoined by a federal court under § 1341. It is not necessary to decide whether the State has a right to place the "legal incidence" of the tax on oil companies to conclude, as did the Second Circuit, that it is "an entirely

different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product." A. 26a.[19] The short of the matter is that the legislative objective in enacting the anti-passthrough provision was "certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." A. 26a. This action is not insulated from federal scrutiny by 28 U.S.C. § 1341.[20]

3. *The Tax Injunction Act Is Also Inapplicable Because the Federal Courts Have Exclusive Jurisdiction Over the Preemption Claim*

Even were appellees' challenge to the anti-passthrough provision an action to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,"

19. The State's reliance on *First Agricultural Bank* v. *Tax Comm'n*, 392 U.S. 339, 347-48 (1968), Juris. St. at 13, is totally misplaced. As the Second Circuit correctly observed, "[i]t is difficult to understand how the State can reasonably construe [that decision] to be helpful here. There was no Section 1341 issue in that case at all — the appeal was not from a district court but a state court." A. 26a.

20. The State's reliance on *Mandel* v. *Hutchinson*, 336 F. Supp. 772 (C.D. Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974), and *Czajkowski* v. *Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978), is wholly misplaced. *Mandel* involved a challenge to a state property tax exemption to *resident* veterans by a *non-resident* veteran who sought to restrain the assessor from denying the exemption to *any* veteran. *Czajkowski* involved an attempt by plaintiffs to enjoin the state from expending funds to enforce a tax against them, relief which the court held was the equivalent of an injunction against the tax itself. Thus both cases involved challenges to a state's authority to tax, not the question whether the state could constitutionally regulate a taxpayer's ability to raise its prices to pay a tax.

The State's argument that § 1341 precludes federal courts from "interfering by injunction with state taxation," Juris. St. at 16, proves too much. If that were correct, the federal courts would have no jurisdiction over any matters affecting state taxation, and that is clearly not the case. *See Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976); *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966); *Wells* v. *Malloy*, 510 F.2d 74 (2d Cir. 1975). After all, that section bars federal jurisdiction only when an action attempts "to enjoin, suspend or restrain the assessment, levy or collection" of a state tax. The State's argument is particularly inapposite here, where the only claimed effect on state taxation is self-inflicted by virtue of the non-severability clause.

the Tax Injunction Act would be inapplicable because there is no "plain, speedy and efficient remedy" in state court. ESA § 211(a) provides that "[t]he district courts of the United States shall have *exclusive* original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder." *Id.* (emphasis added).[21] The decisions of this Court have firmly established that, for the purposes of federal jurisdictional statutes, preemption claims arise under the federal statute claimed to have preemptive effect. *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965); *see also American Federation of Labor v. Watson*, 327 U.S. 582 (1946). Since appellees' preemption claim arises under the EPAA, there can be no state court remedy.[22] This, then, is an added reason why the Tax Injunction Act does not stand as a barrier to federal jurisdiction here.

---

21. In a manner parallel to § 211(a), ESA § 211(b)(2) vests TECA with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the EPAA and ESA]." In partially granting appellees' motion to dismiss the State's appeal, the Second Circuit held that their preemption claim arose under the EPAA because the relevant preemption analysis "necessitates 'a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder' . . . to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy." A. 21a (citations omitted). Thus the court held that the State's appeal of the district court's preemption decision properly belonged in TECA.

22. The State makes no substantive argument concerning the district court's exclusive jurisdiction pursuant to ESA § 211(a). Rather, it seeks to overcome that section by referring to five state court cases in which some of the appellees have allegedly challenged state laws as being preempted by the EPAA. Although the State's characterization of the two of those actions which were brought in New York courts challenging the additional franchise tax imposed by N.Y. Tax Law § 182(1) is patently inaccurate, there is no need to discuss those cases. No jurisdictional issue was raised or decided in those cases and, as this Court has long held, the posture of the litigants is irrelevant to whether a federal court has subject matter jurisdiction. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

B. The Preemption Issue

1. *The Lower Courts Correctly Applied Preemption Principles In Holding The Anti-Passthrough Provision Invalid*

Pursuant to the Supremacy Clause of the United States Constitution, a valid federal statute preempts any state statute which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232, 4233 (March 9, 1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977). Such a conflict most clearly exists when the state statute frustrates an affirmative federal regulation.[23] It also exists though, when the "failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the [federal] statute." *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at 178, *quoting Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). [24] Applying these established

23. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962) (state statute which conflicted with federal statute in such a way that it was impossible to comply with both, held preempted); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (state law in area where Congress has regulated so extensively that any state law frustrates Congress' objectives held preempted); *Jones v. Rath Packing Co., supra* (state statute which applied a more stringent standard than federal standard held preempted because it frustrated articulated congressional policy).

24. Similarly, when Congress or its delegate weighs competing policy considerations and embodies the balance struck in a federal statute or regulation, states are not free to upset that balance. *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra* (state private damage suit which would provide more stringent standards than Interstate Commerce Comission, which had approved particular abandonment in question, held preempted); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (federal statute delegating federal agency responsibility to balance objective of industrial progress with health and safety standards preempted state statute which attempted to impose more stringent standard).

principles, the courts below properly found that the anti-passthrough provision conflicted with and was preempted by the EPAA and its regulations, standing, as it does, as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The district court found that the anti-passthrough provision conflicts with the EPAA and federal regulations as it applies to both exempt and non-exempt products.

With respect to products then subject to controls, the district court concluded:

> By precluding the passthrough . . . the anti-passthrough provision conflicts with the articulated policy allowing the passthrough, and the more general Congressional intent that prices for petroleum products "be set . . . pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government."

A. 59a (citation omitted). The court further pointed out that:

> While the federal policy supports "equitable distribution," and "equitable prices" among "all regions and areas of the United States," New York is seeking to insulate its citizens from increased costs resulting from a local tax while allowing the burden of the tax to fall upon the shoulders of non-New Yorkers.

A. 60a (citation and footnote omitted).[25]

With respect to products then exempt from controls, the district court recognized that under the EPAA

25. The district court further recognized that the anti-passthrough provision also thwarts the DOE policy of "allowing local taxes to be passed through solely to consumers within the taxing jurisdiction," *citing Mobil Petroleum Co.*, 5 DOE ¶ 81,188 (1980), discussed *supra* at 5-6 n.7. A. 60a-61a.

> exempting a product from the price control regulations, rather than constituting an end to federal regulation over those products, represents an affirmative administrative determination that "no such regulation is appropriate . . . pursuant to the policy of the statute."

A. 64a-65a, *quoting Ray v. Atlantic Richfield Co., supra; accord, Mobil Oil Corp. v. Dubno,* 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part,* 639 F.2d 919 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3954 (1981). It thus held that "the anti-passthrough provision . . . 'frustrates the full effectiveness' of the present Federal regulatory policy under the EPAA in several ways," A. 65a, and declared it invalid.[26]

Since the remaining controls had been lifted by President Reagan on January 28, 1981, TECA did not need to analyze separately the anti-passthrough provision's impact on controlled and decontrolled products. Instead, it followed the two-step analysis established by this Court[27] and held that the anti-passthrough provision was preempted. Construing the federal statute, it recognized that "[t]he EPAA and the regulations form a framework for federal control of price and allocation of petroleum prices," A. 6a, which it concluded was still in place because of the President's standby authority to impose regulations. With respect to the state statute, it characterized "[t]he anti-passthrough provision [as] clearly a price control measure in exercise of the State's police power," A. 7a, because its stated purpose is "to prevent 'further increases in the price of petroleum products to consumers'; and to prevent the tax

26. The conflict created by the State's imposition of controls on products which the federal government had determined should be free of controls was obvious. The district court also found that the anti-passthrough provision conflicted with the objectives, such as equitable distribution at equitable prices, which the federal regulators were required to consider when exempting products. *Id.* at 65a-66a.

27. "Making [a preemption] determination 'is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' " *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra,* 49 U.S.L.W. at 4233, *quoting Perez v. Campbell,* 402 U.S. 637, 644 (1971).

from 'fueling inflation by prohibiting pass through of such tax to the consumers of this State.'" *Id.* It thus agreed with the Second Circuit's conclusion that "[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." *Id.* TECA concluded that the federal controls were imposed to assure equitable distribution of oil products at equitable prices, an objective which requires "a fair balance between seller and buyer, and between geographical areas." A. 8a. It therefore held that, by upsetting the balance struck by the federal government, the anti-passthrough provision conflicted with the EPAA, the price regulations and the goals of the federal program and was thus preempted.

2. *The State Presents No Argument Which Is Worthy of Review*

Although any review of TECA's decision would focus on whether that court correctly found conflict, that is not what the State asks this Court to decide. Instead, it advances a number of only tangentially relevant arguments which either are foreclosed by the decisions of this Court or provide an insufficient basis for further review.

a. The EPAA's Express Preemption Provision Does Not Limit The Application Of The Supremacy Clause To State Price Regulations

The State argues that TECA did not accord proper significance to § 6(b) of the EPAA, 15 U.S.C. § 755(b), which provides that any state regulation in conflict with the EPAA regulations and orders is preempted. According to the State, that section demonstrates Congress' recognition "that some state laws bearing on petroleum prices would not be 'in conflict with' regulations or orders issued under EPAA" and further, says the State, "[c]onsistently applied, [TECA's] opinion would invalidate any state law

relating to petroleum prices." Juris. St. at 20. That argument is nothing more than a reiteration of the contention, made and rejected below, that Congress, by enacting an express preemption provision, foreclosed all other forms of preemption. The argument, of course, is irrelevant because a conflict *is* present here and thus there is express preemption within the meaning of § 6(b). Beyond that, the argument is also plainly inconsistent with the Court's decision in *Jones v. Rath Packing Co.*, *supra*, where it held that a determination that a state law was not expressly preempted did not "resolve [the] case, for we still must determine whether the state law [is preempted because it] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " 430 U.S. at 540-41.

Here, as elsewhere, the State seeks to portray TECA's decision as worthy of further review by vastly overstating the scope of TECA's holding. Even though, as the State contends, there may be state laws *affecting* petroleum product prices which are not preempted, the anti-passthrough provision, by directly *regulating* petroleum product prices, actually conflicts with the EPAA and the federal regulations and is preempted whether that preemption is pursuant to § 6(b) or other preemption principles. That is all TECA held.

The State also suggests that, because § 6(b) provides only that state regulations which conflict with federal regulations and orders are expressly preempted, it is inappropriate to analyze the statutory objectives which those regulations must further in determining whether preemption exists. That argument too is beside the point, since both lower courts concluded that the anti-passthrough provision conflicts with the regulations and other official acts of the President's delegates, not just with the EPAA and its objectives.[28] More importantly though, the argument is

28. The State's reliance on *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981), is thus misplaced. There plaintiffs could not or did not point to any federal statute, regulation, or decision

simply inconsistent with the preemption analysis mandated by this Court. Under the State's theory, the purposes of the federal act and regulations would be irrelevant to the preemptive effect of the EPAA, and Congress' objectives would have no bearing on the determination whether there was conflict between the federal and state enactments. This Court, however, has always looked to Congress' objectives to resolve preemption questions even when the state law is in conflict with a federal regulation. *See, e.g., Ray v. Atlantic Richfield Co., supra.* In essence, the State is advancing the illogical proposition that, by enacting §6(b), an express preemption provision, Congress intended to give the EPAA less preemptive effect than a statute without such a provision. That argument is unsound and forms no basis for abandoning the preemption analysis approved by the Court in *Jones v. Rath Packing Co., supra.*

b. The State May Not Undermine The Decision To Deregulate Petroleum Product Prices By Attacking Congress' Logic

The State also asks the Court to review the decisions below because they are supposedly "based . . . on a perception that the revocation of federal regulations pursuant to EPCA represented a legislative decision that, so long as standby authority existed, petroleum products be free of all laws that may have any effect on price." Juris. St. at 23. The State does not base its contrary perception on statutory provisions or legislative history, for such a challenge to TECA's construction of the statute would collide with Congress' clear language. Congress intended, as it stated, to effect "a gradual return to an unregulated market," S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* [1975]

with which severance taxes, such as the one there at issue, were in conflict. Instead they relied exclusively on the general objectives of various federal statutes and programs. Unlike that severance tax, the anti-passthrough provision conflicts with specific, operative federal regulations and orders and, by doing so, thoroughly frustrates accomplishment of Congress' objectives.

U.S. CODE CONG. & AD. NEWS 1956, 2045, not one regulated by the states. Since the State cannot argue on the basis of Congress' intent, it is relegated to challenging its logic.

The fact of the matter, however, is that in 1975 Congress decided to counteract growing OPEC power by removing arbitrary price controls which deterred both domestic production and energy conservation in favor of a free market system as the means to achieve the nine EPAA policy objectives. Rather than achieve this result immediately, Congress required the President to decontrol products gradually, but only after making detailed findings and following specified procedures. Congress' decision, manifested in the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975), and the decisions of the President and his delegates exempting particular products are determinations that, consistent with the policy of the federal statute, *no regulation* is appropriate. *Ray v. Atlantic Richfield Co., supra.* The anti-passthrough provision, a price regulation, directly conflicts with that decision. *See Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979).

As far as the wisdom of Congress' logic is concerned, the State's view is simply irrelevant since, as Judge Blumenfeld recognized when adjudicating the invalidity of the Connecticut anti-passthrough provision:

> It is within neither [the] Court's realm nor its competence to evaluate the wisdom of federal energy policy, nor the economic theories that underlie it. . . . [I]nasmuch as [the anti-passthrough provision] contravenes federal policy by attempting to regulate the price that may be charged in Connecticut . . ., that provision cannot stand.

Mobil Oil Corp. v. Dubno, supra, 492 F. Supp. at 1014-15. *Cf. Steadman v. Securities and Exchange Commission,* 49 U.S.L.W. 4174, 4175 n.10 (February 25, 1981) (where issue

is Congress' intent, "[i]t is not for this Court to determine the wisdom of Congress' prescription"); *Great A&P Tea Co. v. F.T.C.*, 440 U.S. 69, 99 (1979) ("Court is not in a position to review the economic wisdom of Congress.")

c. The State Improperly Relies on Labels, Disregarding the Federal Law's Structure, Purpose and Effect

The State no longer denies that the federal regulations expressly authorized full recovery of all franchise tax increases and that it seeks to prevent the operation of that rule. Instead, the State argues that the district court and TECA erred by concluding that the anti-passthrough provision was preempted as it applied to formerly controlled products because, in the State's view, those regulations only created a duty not to charge more than the maximum lawful price and were not intended to preempt state "rules of tax incidence." Juris. St. at 26. For purposes of determining whether preemption exists, the State's arguments are irrelevant.

In assessing whether a state law conflicts with federal regulations setting a ceiling price or any other federal maximum, the analysis does not begin and end, as does the State's, with the *ipse dixit* that a maximum only establishes a level which may not be exceeded and below which the states may regulate.[29] Rather, as this Court has consistently held, the purposes and objectives of the federal provision must be examined to determine if the state law frustrates their achievement. That was exactly the course the Court followed in *Ray v. Atlantic Richfield Co., supra,* where it held that a federal provision for maximum tanker

29. The State's argument that preemption here turns on whether refiners have a "right" to charge maximum prices in derogation of state law is classic circumlocution. Refiners obviously may charge a price prohibited by a state law if the state enactment is preempted. Conversely, they have no such "right" if the state law is not preempted. Whether preemption, and hence such a "right", exists turns on whether the state law impedes federal objectives. Here it plainly does.

size preempted a state regulation establishing a more stringent requirement. The courts below were obliged to adopt a similar approach here and correctly concluded that the same result was dictated. Nor is preemption dependent on whether Congress manifested a specific intent to preempt state "rules of tax incidence." Conflict is assessed by focusing on "the nature of the activities which the States have sought to regulate, rather than the method of regulation adopted." *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra,* 49 U.S.L.W. at 4233, *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

The nature of the activity which the State has attempted to regulate with the anti-passthrough provision is petroleum product pricing and, in doing so, it has interfered with and substantially frustrated the federal scheme for determining how increased tax costs are allocated. That interference is precisely what the Supremacy Clause prohibits. *Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981), involved a similar attempt by the State of Louisiana to insulate its citizens from the cost of its First-Use Tax on natural gas by regulating the allocation of that tax cost. At the urging of plaintiffs, including the State of New York, represented by appellant Abrams, the Court held that tax was preempted by the federal Natural Gas Act:

> By specifying that the First-Use Tax is a processing cost to be either borne by the pipeline or other owner without compensation, an unlikely event in light of the large sums involved, or passed on to purchasers, Louisiana has attempted a *substantial usurpation of the authority of the [federal agency] by dictating to the pipelines the allocation of processing costs for the interstate shipment of natural gas.*

Id. at 4569 (emphasis added). Since "the State may not trespass on the authority of the federal agency," the Court

held the First-Use Tax was invalid under the Supremacy Clause. The same result should obtain here.

It is also no answer for the State to label the anti-pass-through provision a rule of tax incidence. This Court ten years ago rejected "the aberrational doctrine . . . that state law may frustrate the operation of federal law so long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). By attaching significance to the label "rule of tax incidence," the State asks the Court to revive the very aberrational doctrine it rejected ten years ago, even though the Court has since reaffirmed that implied preemption is compelled by the federal statute's "structure and purpose," not the state's. *Jones v. Rath Packing Co., supra,* 430 U.S. at 525.

d. The Preemptive Effect Of The EPAA And Price Regulations Is Not Diminished By Two Letters Written By DOE Employees

Finally, the State attempts to invoke the jurisdiction of this Court to overturn the unanimous opinion of TECA, a specialized panel with highly developed expertise in energy cases, and the lengthy and well-reasoned opinion of the district court, based on nothing more than two short unauthoritative letters written by DOE lawyers. The State no longer argues, as it did below, that those letters are legally conclusive, apparently recognizing that under the DOE's own regulations and the standards established by this Court in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), they "merely provide general information," 10 C.F.R.§ 205.80, and are entitled to "little weight." It now bases its case on the position that "the primary importance of the DOE letter is not as a ruling of law but as a compelling demonstration that DOE did not believe the New York statute would obstruct the program crafted by its regulations and deregulatory amendments." Juris. St. at 21.

The distinction the State now seeks to draw between a legal analysis and some other form of advice is totally specious and, in this instance, factually inaccurate. What the State requested, according to Eric J. Fygi, author of one of the letters, was an "opinion as to whether aspects of Assembly Bill No. 10609 would be contrary to the [EPAA] or the regulations promulgated by [the DOE]." A. 103a. The author's opinion was clearly directed to a "legal question," not a policy matter, and he expressly said so:

> [T]his view of the *legal question* on which you have requested our advice *is not intended to intimate any view of the merits, as a matter of policy,* of State statutes intended to impose additional taxes on petroleum refining and marketing activities occurring within the respective States.

A. 104a (emphasis added).

The Fygi letter attempts only to analyze the anti-pass-through provision and, as the lower courts found, nothing about it or the letter from former DOE General Counsel Lynn Coleman concerning the Connecticut provision gives them "power to persuade." *Skidmore* v. *Swift & Co., supra.* Both letters reflect a lack of thoroughness. Mr. Fygi's barebones two-sentence opinion, without analysis or citation of authority, was dashed off the same day it was requested. He himself admitted that "the time within which I was advised you required a response to this question *did not permit the exhaustive analysis of the question you posed.*" A. 104a. Although Mr. Coleman took somewhat longer to respond, his letter reflects no analysis of the issue whatsoever.

Moreover, the reasoning of both is invalid. Mr. Fygi adopted the conclusion of Saul Heckelman, the New York Tax Commission's Special Counsel, *see* Appendix, who applied only the physical impossibility conflict test, not the alternative "stands as an obstacle" standard as required by this Court in *Ray v. Atlantic Richfield Co., supra,* 435 U.S. at

158. Mr. Coleman adopted no standard whatsoever. His conclusion that "the Federal regulations supersede State law only where there is legal conflict between them," A. 108a, is simply a tautology. He did not state what he understood by "legal conflict," much less explain why he believed the Connecticut provision presented no such conflict. He did not consider the New York provision at all.

Since both letters are entitled to little weight and are inconsistent with DOE's more authoritative regulations and orders,[30] they offer a wholly insufficient basis on which to invoke this Court's jurisdiction to review the decisions below.

30. 10 C.F.R. §§ 205.80-.86; *Mobil Petroleum Co.*, 5 DOE ¶ 81,188 (1980); *Union Oil Co.*, 5 DOE ¶ 81,342 (1980); *Union Oil Co.*, 2 DOE ¶ 80,174 (1978); *Texaco Inc.*, DOE Case No. BEE-1246 (Aug. 22, 1980), *finalized*, 6 DOE ¶ 81,382 (1980); *Amerada Hess Corp.*, DOE Case No. BEE-1310 (Sept. 24, 1980), *finalized*, 7 DOE ¶ 81,068 (1980).

CONCLUSION

For the foregoing reasons, appellees respectfully request that the State's appeal be dismissed or, in the alternative, that the decision of TECA be affirmed without further review. If the State's appeal is dismissed and its Jurisdictional Statement treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, appellees submit that it should be denied.

Respectfully submitted,

August 14, 1981

DONOVAN LEISURE NEWTON & IRVINE
Thomas R. Trowbridge III
30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

James P. Shaughnessy
1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4700

BOND, SCHOENECK & KING
One Lincoln Center
Syracuse, New York 13202

Counsel For Plaintiffs-Appellees
Mobil Oil Corporation,
Atlantic Richfield Company,
United Refining Company,
Chevron U.S.A. Inc.,
Amoco Oil Company,
Texaco Inc. and
Exxon Corporation

EDWARD F. GERBER
631 University Building
Syracuse, New York 13202
(315) 472-4484

Counsel For Plaintiff-Appellee
Gulf Oil Corporation

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Stanley D. Robinson
Randolph S. Sherman
425 Park Avenue
New York, New York 10022
(212) 407-8000

Of Counsel:

ALFRED E. KEANE
DANIEL A. PILOSENO
Texaco Inc.
Tax Department
2000 Westchester Avenue
White Plains, N.Y. 10650
(914) 252-4392

BARRY WERTZ
Counsel
Exxon Company U.S.A.,
a Division of Exxon
Corporation
P.O. Box 2180
Houston, Texas 77001
(713) 656-3583

ARTHUR C. VANGELI
SYDNEY M. AVENT
1 Presidential Blvd.
Bala Cynwyd, PA 19004
(215) 581-2121

HANCOCK, ESTABROOK, RYAN,
SHOVE & HUST
William L. Allen, Jr.
One Mony Plaza
Syracuse, New York 13202
(315) 471-3151

Counsel For Plaintiff-Appellee
Amerada Hess Corporation

CLEARY, GOTTLIEB, STEEN
& HAMILTON
James C. Blair
George Weisz
Sara D. Schotland
Thomas J. Moloney
One State Street Plaza
New York, New York 10004
(212) 344-0600

and

BOUCK, HOLLOWAY and KIERNAN
Warner M. Bouck
107 Columbia Street
Albany, New York 12210
(518) 465-2201

Counsel For Plaintiff-Appellee
New England Petroleum
Corporation

APPENDIX

June 10, 1980, Opinion of S. Heckelman relied upon in letter of Eric J. Fygi, June 10, 1980

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
ALBANY, N.Y. 12227

June 10, 1980

The Honorable Richard A. Brown
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Judge Brown:

You have requested an opinion as to whether the anti-pass on provision in Assembly Bill No. 10609 which would impose a gross receipts tax on oil companies is legal. In my opinion, the anti-pass on provision is legal. The Emergency Petroleum Allocation Act of 1973 (hereinafter EPAA) (P.L. 93-159), as amended by the Energy Policy and Conservation Act (P.L. 94-163), directs the President to promulgate regulations concerning allocation and pricing of crude oil, residual fuel oil and each refined petroleum product (15 USCS §753(a)). The EPAA provides that the pricing regulation shall provide for a dollar for dollar pass through of both net increases and decreases in the product cost of petroleum produced (15 USCS §§753(b)(2) and 758).

Under the pricing regulations, a refiner may not charge a price which exceeds the maximum price as computed under the regulations. The two most important elements in the pricing formula are increased costs of crude oil and increased non-product costs. Federal, state and local taxes are non-product costs. The taxes which may be included in computing the maximum allowable price, i.e., which may be passed on, are "federal, state, and local property, excise, franchise and other similar taxes." The regulation also provides that increased "federal, state and local income

taxes are not includible in" the computation of the maximum allowable price, i.e., may not be passed on (10 CFR 212.83(c)(2)(iii)(E)(7)(i)). A franchise tax measured by gross receipts like the one which would be imposed by the enactment of A. 10609 would either be characterized as an excise tax or a franchise tax and, therefore, under the refiner regulations, the proposed tax would be one of the non-product cost increases which may be passed through in an oil company's price for petroleum (Mobil Petroleum Company, Inc., Decision and Order dated March 6, 1980; cf. Ruling 1974-4 Federal Energy Guidelines Par. 16,014 (1974)).

With respect to Federal preemption, section 6(b) of the EPAA provides as follows:

> "The regulation under section 4 [15 USCS §753] and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order." (15 USCS §755(b))

While the specific reference to preemption in the provision set forth above does not refer to Federal pricing regulations, the phrase in the provision "any program for the allocation of" certain oil and petroleum products can be interpreted to include the Federal pricing regulations since those regulations are an integral part of allocation (see 1973 U.S. Code Congressional and Administrative News 2589). However, since an oil company could comply with the proposed anti-pass on provision as well as the Federal pricing regulations, the anti-pass on provision in A. 10609 is not prohibited by the preemption provision of the EPAA.

The petroleum pricing regulations do not require a company to charge the maximum allowable price. The regulations only permit a company to charge the maximum

allowable price. Therefore, a state could prohibit the inclusion of a gross receipts tax in the computation of the price of petroleum.

The Federal government, in my opinion, has not foreclosed all state legislation in the petroleum pricing area. Nothing in the EPAA indicates that Congress intended to foreclose state legislation in this area. In fact, state regulation of the allocation of petroleum which does not conflict with the Federal law or regulations has been upheld by the Maryland Court of Appeals (*Governor of Maryland v. Exxon Corp.*, 279 Md 410, 370 A2d 1102).

In addition, it should be stressed that there are many forms of petroleum as to which there is no question of Federal preemption at all. Pricing of many petroleum products has either never been covered by the Federal pricing regulations or has been decontrolled. These include: aviation gasoline, kerosene, No. 1 heating oil, residual fuel oil, newly discovered fuel oil and heavy crude oil. In addition, the Federal price controls on petroleum products will expire on September 30, 1981 (15 USCS §760g).

It should also be noted that states may fix prices by state action without violating the Sherman Act as long as there is continuing active supervision of such price fixing. (*Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, U.S. 63 L ed 2d 233 (1980)).

Very truly yours,

s/ SAUL HECKELMAN

Saul Heckelman
Special Counsel

SH:lm